STRAITS SETTLEMENTS.

[APPELLATE CIVIL JURISDICTION]

TAN YOW KEE.....Plaintiff
(Appellant)

vs.

1. CHOP TECK HWAI
2. OFFICIAL ASSIGNEE.....Defendants
(Respondents)

[SINGAPORE CIVIL APPEAL No. 20 OF 1932]
[SINGAPORE SUIT No. 304 OF 1932]

Bankruptcy — attachment of debtor's property before judgment—Effect of receiving order —whether attaching creditor secured—Ordinance No. 102 (Civil Procedure Code), S.689; Ordinance No. 44 (Bankruptcy) Ss. 2, 8(2) & 48.

A creditor, who was under section 689 of the Civil Procedure Code attached the property the debtor before judgment, is a "secured" creditor within the meaning of section 2 of Ordinance No. 44 (Bankruptcy) and under S. 8 (2) of the Ordinance the property only passes to the Official Assignee subject to the creditor's charge. The provisions of section 48 of the Bankruptcy will not affect such attachment.

APPEAL from an order of Whitley, J. dated the 4th November, 1932.

The plaintiff-appellant issued on 23rd March, 1932 a writ against the first defendant Chop of which one Tay Mwee Hiong was the sole proprietor. On the 13th of April 1932 the plaintiff-appellant obtained an order attaching the property of the defendant Chop before judgment. The action was tried on the 31st August and 1st and 2nd September, 1932 and judgment was reserved. On the 9th day of September 1932 Tay Mwee Hiong was adjudged bankrupt and on the following day judgment was delivered for the plaintiff-appellant for $7,856.44 and costs. By Order of Court dated the 16th of September 1932 the Official Assignee was added as a defendant and thereafter the proceedings were continued as between the plaintiff and the Official Assignee of the property of Tay Mwee Hiong. On the 11th of October 1932 the plaintiff made an application for a declaration that he was a secured creditor in the bankruptcy of Tay Mwee Hiong for the amount of his judgment. The Official Assignee on behalf of the general body of creditors opposed the application.

S. B. Tan, for the plaintiff.

E. N. Taylor, Assistant Official Assignee for the Creditors other than the plaintiff.

Cur. Ad. Vult.

Whitley, J. delivered the following Judgment on the 4th of November, 1932.

4-11-1932.

WHITLEY, J.—The facts material to this Summons are shortly as follows:

On 23rd March, 1932, the Plaintiff issued a writ against the Defendant Chop of which Tay Mwee Hiong was sole proprietor.

On 13th April, the Plaintiff obtained an order under section 689 of the Civil Procedure Code attaching the Chop's property before judgment.

On 6th May, an application by the Defendant Chop to set aside this order was dismissed with costs.

On 2nd September, the hearing of the action was concluded judgment being reserved.

On 9th September, Tay Mwee Hiong was adjudged Bankrupt.

On 10th September, judgment was delivered in favour of the Plaintiff for $7,856.44 and costs.

On 16th September, Plaintiff obtained an order that the proceedings be continued between the Plaintiff and the Official Assignee of the property of Tay Mwee Hiong and that the Official Assignee be added as a defendant.

The present summons as amended in Court asks for a declaration that Plaintiff is a secured creditor on the property attached before judgment under the order of 13th April and for an order that the Sheriff do sell the attached property and out of the proceeds pay to the Plaintiff the amount of the judgment.

The Official Assigneee opposes the application on the grounds that section 48 of Ordinance No. 44 (Bankruptcy) expressly enacts that the creditor is not to be entitled to retain the benefit of the attachment against the Official Assignee unless the attachment is completed by sale and satisfaction out of the proceeds of the judgment in execution of which the attachment was made before notice of a petition or act of bankruptcy. He also contends that the Plaintiff is not a secured creditor within section 8(2) of the Bankruptcy Ordinance.

This raises two interesting points which have apparently not yet been authoritatively decided.

Section 689 of the Civil Procedure Code reads as follows:—

If it is shown to the satisfaction of the Court or a Judge, at any time after the issue of the writ of summons, by evidence on oath, that the plaintiff has a good cause of action, or other valid claim, against the defendant; and

(*a*) that the defendant is absent from the Settlement, and that his place of abode cannot be discovered;

(*b*) that service of a writ of summons cannot, without great or unreasonable delay or difficulty, be effected; or

(*c*) that the defendant, with intent to obstruct or delay the execution of any judgment which has been, or may be, passed against him, has removed or is about to remove, or has concealed, or is concealing, or making away with, or

handing over to others any of his moveable or immoveable property;

the Court or a Judge may order that the property of the defendant, or any part thereof, be forthwith secured and taken into the custody of the Sheriff, as a pledge or surety to answer the just demand of the plaintiff, until the trial of such action and judgment and satisfaction thereon.

The procedure provided by this section is unknown in English practice so that no direct assistance can be derived from English cases.

I will deal first with the question as to whether the Plaintiff is a secured creditor within section 8(2) of the Bankruptcy Ordinance.

Section 8 provides that:—

(1) "On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceeding in respect of such debt unless with the leave of the Court and on such terms as the Court may impose.

(2) "This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

The result of that is that if a creditor is not a secured creditor he is debarred by section 8 from taking advantage of any legal process against the bankrupt; and section 10 expressly provides for the staying of any process which is in course of execution.

Section 2 says that a secured creditor "means"—it does not say "includes"—

"A person holding a mortgage charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor."

It is not pretended that there is here a mortgage or a charge but it is said there is lien, that is to say that the creditor holds a lien by means of the possession of the Sheriff as a result of the attachment order. It is contended that the effect of the words taken into the custody of the Sheriff as a *pledge or surety* to answer the just demand of the plaintiff" is to give lien on the property so taken into custody and thus constitute him a secured creditor by Statute.

Mr. Tan for the applicant argued that the position and rights of the attaching creditor are similar to those of a plaintiff when a defendant who has paid money into Court subsequently becomes bankrupt. He relied upon the cases of *Ex parte Banner*, L.R. 9 Ch. 379, where in an action on a bill of exchange the defendant deposited money in Court to abide the event; *Re Gordon*, 4 Mans. 141 in which money was paid into Court with a denial of liability and *Re Ford*, (1900) 2 Q.B. 211 in which the defendant paid money into Court as a condition of leave to defend. In each case the defendant became bankrupt and it was held that the plaintiff was a secured creditor. These cases are however distinguishable on the ground that in each case there was a voluntary deposit of the money by the defendants and not as in the present case an attachment of all their property under an order of Court obtained *ex parte*.

Reference was also made to the statutory liens which owe their inception to a proceeding *in rem* and arrest of a ship in the Admiralty Division under the Admiralty Court Act 1861. Under that procedure upon production of a proper affidavit a warrant of arrest is issued and under it the marshal of the Court may seize the ship and the Court may adjudicate upon it. It was held in the case of *The Cella*, 13 P.D. 82 that effect of such seizure, though there may be no maritime lien, is that from the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged to be due to the claimant.

That case in many respects bears a close analogy to the present case but it has to be borne in mind that Section 35 of the Admiralty Court Act 1861 expressly provides for proceedings *in rem*, that the action in such cases is against the ship, and that this right to proceed *in rem* arises from the special nature of the subject-matter of the claim. It seems to me by no means clear that our section 689 was intended to create a similar lien. The history of the section shows that it originally, like the "Proceedings by Foreign Attachment" in the Mayor's Court in London provided a process to compel appearance. This process in the Charters of 1826 and 1853 applied only to defendants outside the jurisdiction. Section 36 of Ordinance No. 5 of 1868 extended its scope to cases where a defendant was concealing property and section 20 of Ordinance VIII of 1880 amended it into its present form. It is clearly intended to prevent the defendant from making away with his property so long as the just claim of the Plaintiff remains unsatisfied but I feel doubtful whether it is intended to go so far as to make the Plaintiff a secured creditor in preference to any other creditors. It seems to me that the matter turns to a large extent upon the answering to the question put by Lord Esher, M.R. in the course of his judgment *In re Dickson*, 6 Morrell 1. In that case a judgment creditor obtained an order appointing a receiver to receive the property of a judgment debtor. The receive took possession and continued in possession until the debtor was adjudicated bankrupt, no part of the goods having been sold. Lord Esher

observed "Does the receiver hold. the goods so as to give the creditors possession of them as an agent for the creditors? That cannot be. He is a receiver appointed by the Court in order that the Court may deal subsequently with the matter. He holds as agent for the Court, he does not hold for the creditors at all. If the case stood upon section 9(2) (from which section 8(2) of our Bankruptcy Ordinance is taken) therefore, it does not come within the section at all because it is not made out that the creditor is a secured creditor." The ruling in that case was followed in *In re Potts ex parte Taylor*, 10 Morrell 52. Although by reason of the inclusion of the words "pledge or surety" in section 689 the matter is not free from doubt I incline to the view that the possession of the Sheriff in this case is analogous to that of the receivers in the two cases cited above and that it has not been made out that the Plaintiff is a secured creditor within section 8(2) of the Bankruptcy Ordinance.

Whether that be so or not I think his application must fail by reason of the provisions of Section 48 of the Bankruptcy Ordinance which reads as follows:—

> 48. (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.
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> (2) (*c*) an attachment of the property is completed by the sale of such property and the satisfaction out of the proceeds of such sale of the judgment in execution of which the attachment was made.

Whether the Attachment makes the creditor a secured creditor or not it is clear that he has attached property belonging to the debtor. That being so he is not entitled to retain the benefit of the attachment against the Official Assignee unless he has completed the attachment before the date of the receiving order. There has been no sale and satisfaction and consequently he has not completed and the claim of the Official Assignee must prevail. It is argued that this section cannot apply to an attachment before judgment because such an attachment is not made in execution of any judgment of which there can be satisfaction. That argument is I think fallacious.

The wording of subsection (2) (c) may be somewhat obscure but I think that execution must mean or include anticipatory execution. Otherwise the section in so far as it refers to attachment of property is meaningless, for attachment of property before judgment under section 689 is so far as I have been able to ascertain the only attachment of property provided for in our procedure. The phrase "attachment of property" occurs only in sections 689-695 inclusive and sections 602 and 606 of the Civil Procedure Code. Sections 689-695 deal with attachment before judgment and sections 602 and 606 with the times at which orders for attachment of property may be executed. It would seem then to follow that since there is no other "attachment of property" known to our procedure section 48 must refer to attachment before judgment. Support is lent to this view by the fact that the words attachment of property and subsection 48(2) (c) of our Ordinance do not appear in the corresponding section 40 of the English Bankruptcy Act. Our section 40 has been taken word for word from English section with this single addition. The reason for the alteration is clear. There is no such thing as "attachment of property" in the English Procedure. In the index to the Annual Practice we find "attachment of debts" and "attachment of person" but not "attachment of property." Consequently there was no need in the English Act to provide for "attachment of property." In this Colony the new procedure has been introduced—attachment of property before judgment—and consequently words had to be added in our section 48 to make that section cover such attachment.

If this were not so as the author of Mr. Van Someren's Civil Procedure points out in his notes to section 689 arbitrary results would follow.

> "A plaintiff who can make a case under (a), (b) or (c) obtains a priority over a plaintiff who does not happen to have the necessary evidence, even where the latter has issued his writ first and succeeded in serving it and proceeded in all respects as diligently as the former. Practitioners know how strong a temptation this offers to the unscrupulous litigant who often wishes to make an application under this section on flimsy, if not perjured, evidence."
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> "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

Shannon Realties v. *St. Michel*, 1924 A.C. per Lord Shaw at page 192.

I think the only possible construction to be put upon section 48 is that the attachment of property therein referred to is attachment before judgment.

To sum up then the conclusion at which I have arrived is that section 689 does not constitute the Plaintiff a secured creditor in the full sense of the word within section 8(2) of the Bankruptcy Ordinance but that it only protects him to the extent that the Defendant is prevented from making away with his property pending the determination of the action. Furthermore whether he be secured creditor or not he comes within section 48 and consequently not having completed the attachment he cannot retain the benefit of it as against the Official Assignee.

I would therefore dismiss the Summons with costs.

Against the order of Writley, J. the plaintiff appealed and the appeal was heard before Murison, C.J., Burton and Terrell, JJ.

The arguments of Counsel appear sufficiently from the Judgments of the Court of Appeal.

Cobbett (*S. B. Tan* with him), for the Appellant.

E. N. Taylor, Assistant Official Assignee for the creditors other than the Appellant.

Cur. ad. vult.

21-12-1932.

MURISON, C.J.—This is an appeal against an order of Whitley, J. dated 4th November, 1932.

The facts are simple.

On the 23rd March, 1932, the Plaintiff issued a writ against the Defendant's Chop, of which Tay Mwee Hiong is the sole proprietor.

On the 13th April, the Plaintiff attached the Chop's property before judgment under section 689 of the Civil Procedure Code.

On 2nd September, 1932, the hearing of the action was concluded and judgment was reserved.

On the 9th September, before judgment was delivered Mwee Hiong was adjudged bankrupt.

On the 10th September, 1932, judgment was delivered for the Plaintiff for $7,856.44 and costs.

On the 16th September, by order of the Court the Official Assignee was added as a Defendant and proceedings were continued between the Plaintiff and the Official Assignee of the property of Mwee Hiong.

On the 30th September, by order of the Court the attached property was sold, but the application to pay the Plaintiff out of the proceeds was adjourned into open Court for hearing.

On the 11th October, the adjourned summons was heard and on the 4th November, two orders were made. By the first the summons was amended by an addition to paragraph 2 thereof, whereby the Plaintiff asked for a declaration that he was a secured creditor in the Mwee Hiong Bankruptcy for the amount of his judgment. The second order was that the summons, as amended, be dismissed with costs.

The present appeal is against the second of these two orders.

The question is whether the Plaintiff can retain the benefit of the attachment as against the Official Assignee.

Section 689 of the Civil Procedure Code states the position of the attaching creditor. It says that in certain cases (and it is not disputed that the Court decided that such a case had occurred) the Court may order:—

> "that the property of the Defendant or any part thereof be forthwith secured and taken into the custody of the Sheriff as a pledge or surety to answer the just demand of the Plaintiff until the trial of such action and judgment and satisfaction thereon".

This process is commonly referred to as "attachment before judgment"—which in fact is the caption—under which the section appears in the Code.

Several questions arise.

The first question I deal with is whether in view of section 48 of Ordinance No. 44 (Bankruptcy) the Plaintiff is still entitled, by virtue of section 689 of the Civil Procedure Code, to retain the benefit of the attachment as against the Official Assignee.

The material parts of section 48 of Ordinance No. 44 (Bankruptcy) are as follows:—

> "48 (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.
>
> "(2) For the purposes of this Ordinance an attachment of property is completed by the sale of such property and the satisfaction out of the proceeds of such sale of the judgment in execution of which the attachment was made".

It is clear that so far as sub-section (1) goes the Plaintiff could retain the benefit of the attachment, for presumably the attachment is completed when the Court has made an order to that effect and the Sheriff has taken possession of the assets. But then the provisions of sub-section 2(c) defining completion of attachment

have to be considered. This definition applies in terms only to attachments in execution of a judgment. The Plaintiff says that the words plainly apply only to executions after judgment and that his attachment being before judgment is not subject to the terms of completion indicated in sub-section 2(c). The Official Assignee says that the definition must impliedly extend to attachments before judgment. The curious wording of the definition, of course, arises from the fact that in England (whence this part of the law has been taken) there is no attachment of property before judgment while in the Colony there is. The learned judge got out of the difficulty by saying that the word "execution" must mean "anticipatory execution;" that, therefore, the attachment was not complete as there was no satisfaction of the Plaintiff's debt; and that the plaintiff, therefore, lost the benefit of his attachment. With the greatest deference to the learned judge I am of opinion that this construction is so violent, and so contradictory to the plain words of the sub-section, that I feel compelled to seek for some other construction. The only reasonable meaning which I can attach to the section as a whole is that it was not intended to apply to attachments before judgment. As this appeal is concerned only with such attachments, I, therefore, hold that section 48 is not applicable to it.

It is then argued that the next obstacle in the way of the Plaintiff retaining the benefit of his attachment lies in the provisions of section 8(2) of Ordinance No. 44 (Bankruptcy).

Section 8 of the Ordinance is as follows:—

"8 (1) On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Ordinance no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceeding in respect of such debt unless with the leave of the Court and on such terms as the Court may impose.

"(2) This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

"(3) On a receiving order being made against debtor he shall, within twenty-four hours after such order, file an affidavit in the office of the Official Assignee, containing a true and correct statement of the names and residences of all the partners, if any, in his business. Such statement shall for the purposes of this Ordinance be deemed to be part of the debtor's statement of his affairs referred to in section 16.

"(4) On such order as aforesaid being made against a debtor the Official Assignee shall forthwith take possession of all books of account and other papers and documents in the possession, custody or control of the debtor relating to his property or affairs, and may take into his possession all or any deeds, books, documents and other property of the debtor."

The Plaintiff must, therefore, show that he is a "secured" creditor, that is, that he has a mortgage charge or lien on the property of the debtor as a security for a debt due to him from the debtor.

It is not contended that the Plaintiff has a Mortgage, but it is contended that he has a "charge" or a "lien." It might, I think, also have been contended that the assets in question after the attachment ceased to be property belonging to the defendant and I think it is upon this principle, rather than upon the existence of a charge or lien that the cases which I am about to cite were decided.

The Plaintiff relies upon some English cases which appear to be very similar to the present case. Thus in *Ex parte Banner*, L.R., 9 Ch. 379 the Defendant paid money into Court to abide the event, and in *Re Gordon* (1897) 4 Manson, 141, the Defendant paid money into Court with a denial of liability, and in *Re Ford* (1900) 2 Q.B. 211 the Defendant paid money into Court as a condition of leave to defend. In all of these cases the Defendant became bankrupt and it was held that the Plaintiff was a secured creditor within the meaning of the words of the English section corresponding to our section.

The learned trial judge did not accept these cases as authorities because in all of them the payment into Court was voluntary, whereas in the present case the goods were seized under an order of Court.

With respect I do not think the difference is material. Whether the act of transfer to the Sheriff or the Court was voluntary or compulsory the money or the goods are held to answer a claim as yet undetermined. It may be that the judgment on the claim, when entered, dates back to the date of the Plaintiff's writ and the title to the money or the goods enures in the Plaintiff as at that date. Anyhow, as Vaugham Williams J. said in *Re Gordon* of payment into Court—"It is in effect a conditional payment to the Plaintiff: the money is to be the money of the Plaintiff if he succeeds in establishing his title to it." And as James, L.J. said in *Ex parte Banner* "It belongs to the party who is found eventually to be entitled to the sum in dispute." And in *In re Ford* Wright, J. says: "It is settled that where money is paid into Court to abide the event it must be treated as a security that the Plaintiff shall not lose the benefit of the decision of the Court in his favour." The very

object of such an order (*i.e.* for payment in) is that the Plaintiff shall be in as good a position, so far as the money paid in extends, against contingencies such as bankruptcy as if he had got an immediate judgment.

In my opinion the principle in these cases governs cases of attachment before judgment in this Colony and the title of the Plaintiff cannot be successfully attached by the Official Assignee if the defendant is adjudicated bankrupt.

I would, therefore, allow the appeal and direct payment out of Court to the Plaintiff of the amount of his claim and the taxed costs of this appeal and of the hearing in the Court below. Any deficiency in such costs must be paid by the second Defendant out of the assets in his hands.

BURTON, J.—The Plaintiff sued Chop Teck Hwai for salary and bonus due by the defendant firm. He obtained an attachment before judgment on 13th April, 1932. The action was tried on 31st August and 1st and 2nd September, and judgment was reserved. On 9th September, 1932, Tay Mwee Hiong the proprietor of Chop Teck Hwai was adjudged bankrupt, and on the following day judgment in the action was delivered for the Plaintiff for $7856-44 and costs. The Official Assignee was joined as a party on 16th September.

The sole question in issue in this appeal is whether the Plaintiff is a secured creditor by virtue of the attachment before judgment; and if he is, whether he can retain the benefit of the attachment against the Official Assignee.

The Attachment before judgment was made under section 689 of the Civil Procedure Code, which after providing for the circumstances in which an attachment may issue, continues:—

> "The Court or a Judge may order that the property of the defendant or any part thereof be forthwith secured and taken into the custody of the Sheriff as a pledge or surety to answer the just demand of the Plaintiff, until the trial of such action and judgment and satisfaction thereon."

The literal and natural meaning of these words is to my mind beyond doubt. They create a charge on the property in favour of the Plaintiff which is to enure until the satisfaction of his demand. The legislature has clearly signified this intention by the use of the word "Pledge" which is an apt word to create a charge, so that the effect of the section is to render the property in the Sheriff's hands subject to the same conditions as if the Plaintiff himself had pledged it as a security for any sum which might be found due in the action.

A 'secured creditor' is defined in section 2 of the Bankruptcy Ordinance as "a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor." The pledgee of an article is clearly within the meaning of this definition and the Plaintiff therefore is *prima facie* a secured creditor by virtue of his attachment under section 689. I do not think that the intervention of the Sheriff in any way affects the rights of the parties because he is merely the custodian of the property, which he holds in pledge to the Plaintiff conditionally on his success in the action to answer the sum found due to him.

Unless therefore the Plaintiff's security is taken away by section 48, he is a secured creditor for the purposes of this Bankruptcy. If section 48 applies at all, it must apply by virtue of the reference in it to the attachment of property. The Plaintiff was never in a position to become an execution creditor, because the adjudication order was made before he obtained judgment. The learned trial Judge relied on these words because, as he said, "Otherwise the section in so far as it refers to attachment of property is meaningless, for attachment of property before judgment under section 689 is, so far as I have been able to ascertain, the only attachment of property provided for in our procedure." But the attention of the learned Judge was not directed to section 640 of the Civil Procedure Code which provides for garnishment of property, and in my opinion it is not necessary at all to refer the attachment of property mentioned in this section to property attached before judgment. The section is, I think intended to apply to execution proceedings, and to execution proceedings only. Subsection 2(c) makes this perfectly clear by the words

> "an attachment of property is completed by the sale of such property, and the satisfaction out of the proceeds of such sale of the judgment in execution of which the attachment is made."

This attachment was not made in execution of a judgment. And if I am right in holding that this section only applies to execution proceedings, then the words "or property belonging to him" have a natural reference to property garnished under section 640 of the Code. These words do not occur in the corresponding section of the English Bankruptcy Act, because in England there is no such thing as the garnishment of property; and the local draftsman introduced these words, not with any reference to attachment before judgment, but because of the special introduction of property into section 640. Section 48 of the Bankruptcy Ordinance corresponds with section 40 of the English Bankruptcy Act except for the alterations necessitated by this provision for the garnishment of property.

I conclude therefore that the Plaintiff is a secured creditor for this sum and that his security is not destroyed by section 48 of the Bankruptcy Ordinance. There is support for this

view in the analogy of money paid into Court. The case of *Ex parte Bouchard*, 12 Ch. D. 26 is an authority for proposition that money paid into Court to abide the event is a fund for the security of the particular creditor, and does not vest in the Official Receiver. See also *In Re Ford* (1900), 2 Q.B. 211. If therefore the defendant in the present case had chosen to redeem the pledge by paying a sum of money into Court, this money on the authority of these cases would be secured to the Plaintiff, and consequently would be in exactly the same position as the property.

I think therefore that the appeal should be allowed and the declaration made as prayed. The Plaintiff is entitled to costs here and in the Court below against the second defendant, and the money in Court, or as much thereof as is necessary should be paid out to the Plaintiff in satisfaction of his claim and costs.

TERRELL, J.—The facts of this case are fully set out in the judgment of the learned trial judge and it is not necessary to repeat them. The important circumstances are that the plaintiff obtained an order on the 13th April, 1932, attaching before judgment certain property of the defendants under Section 689 of Civil Procedure Code and that on the 9th September, 1932, before judgment had been delivered, the defendants were adjudged bankrupt. The plaintiff now claims that he is a secured creditor in the property attached on the 13th April, 1932. The Official Assignee on behalf of the general body of creditors resists this claim, which was decided by the learned trial judge in the Official Assignee's favour and the plaintiff has appealed.

The learned trial judge held in effect that the plaintiff was not a 'secured creditor' within the meaning of Section 8(2) of the Ordinance No. 44 (Bankruptcy) and that in any case the provisions of Section 48 of the same Ordinance applied, the attachment not having been completed by sale or satisfaction out of the proceeds before the date of the Receiving Order Section 48 of the Ordinance is as follows:—

> "48 (1) Where a creditor has issued execution against the goods or lands of a debtor or has attached any debt due or property belonging to him he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission or any available act of bankruptcy by the debtor.
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> "(2) For the purposes of this Ordinance (a) an execution against goods or land is complete by seizure and sale or in the case of an equitable interest in land by the appointment of a receiver, (b) an attachment of a debt is completed by receipt of the debt; (c) an attachment of property is completed by the sale of such property and the satisfaction out of the proceeds of such sale of the judgment in execution of which the attachment is made."

In the corresponding English section, Section 40, the words 'or property belonging' do not occur. The reason for this is plain, as under the English methods of execution there is no such thing as attachment of property and it was not therefore necessary to provide for this form of execution in the Bankruptcy Act.

Under the Civil Procedure Code, however, attachment of property is a recognised form of execution and may be of two kinds. First under Section 640 attachment of property in the control or custody of another person, upon which execution may be levied by garnishment notice, and secondly attachment of property before judgment under Section 689. Whereas in England garnishment is limited to the attachment of debts (see Order XLV rule 1), under the Civil Procedure Code there may be attachment of property as well as of debts and accordingly the wording of the corresponding section of Ordinance No. 44 (Bankruptcy) has to be extended so as to cover garnishment of property as well as garnishment of debts.

It is argued, however, that the wording of Section 48(1) of Ordinance No. 44 (Bankruptcy) is perfectly general and that when the subsection speaks of "attachment of property" an attachment before judgement under Section 689 of the Civil Procedure Code must be included. In my opinion Section 48(2) renders this interpretation impossible. The attachment of property therein referred to is an "attachment in execution of a judgment," and cannot without doing violence to the language of the section be held to include an attachment where there has as yet been no judgment. I do not think that the execution referred to can mean or include "an anticipatory execution" as suggested by the learned trial judge. I venture to think that the learned trial judge was misled by the fact that the provisions of Section 640, which includes attachment of property by way of garnishment, were not brought to his attention. I am inclined to agree that if the attachment of property before judgment under Section 689 had been the only kind of attachment of property referred to in the Civil Procedure Code it would have done less violence to the wording of Section 48 to have given to it the interpretation which the learned trial judge has adopted than to treat the words "or property belonging" as meaningless.

It is also argued that Section 48(2) applies in any event because the normal practice in the case of an attachment before judgment is to implement it by issuing a writ of execution in

respect of the property attached after judgment has been obtained. It is not really necessary to decide this point as in fact no such writ of execution has been issued, the property having been realised and the proceeds paid into Court by arrangement between the parties. I am, however, inclined to the opinion that if the judgment creditor has a charge or lien under Section 8(2) of Ordinance No. 44 (Bankruptcy), Section 48 does not come into play at all, and that he cannot be deprived of such charge or lien by the method he happens to choose to enforce it in the absence of any express provision to that effect.

It is to be noted that what the Bankruptcy Ordinance aims at is to deprive a judgment creditor of the fruits of his execution when such execution has not been completed before the Receiving Order or notice of an act of bankruptcy. The methods of execution referred to include garnishment but do not specifically refer to the appointment of a receiver by way of equitable execution. The English Bankruptcy Act also makes no reference to property seized by the appointment of a receiver by way of equitable execution. It has, however, been held in England that the appointment of such a receiver is not strictly a form of execution at all (see *Morgan* v. *Hart*, (1914), 2 K.B. page 188) but property in the hands of such receiver has nevertheless been held available for the general body of creditors on the ground that he holds the property as agent for the Court and not on behalf of the judgment creditor (see per Lord Esher, M.R. in *In re Dickenson*, 6 Morrell page 1). I only refer to this case for the purpose of pointing out that under our Civil Procedure Code, Section 621, which provides for the appointment of a receiver by way of equitable execution, is included under Chapter XXIX which is headed "Writs of Execution." It is preceded by the sections relating to writs of seizure and sale and followed by Section 640 relating to garnishment. In this Colony, therefore, the appointment of such a receiver is treated as a method of execution and falls directly within the provisions of Section 48(1) of Ordinance No. 44 (Bankruptcy). It follows that in this Colony the decision in *Morgan* v. *Hart* could be supported on this additional ground. In view, therefore, of the fact that the appointment of such a receiver is a method of execution *after* judgment I do not think that the English authorities have any bearing on the question now before the Court, which must be decided by the meaning to be attached to Section 689 of the Civil Procedure Code and Section 8(2) of Ordinance No. 44 (Bankruptcy). Section 689 of the Civil Procedure Code under which the order of the 13th April, 1932 was made concludes as follows:—

> "the Court or a Judge may order that the property of the defendant, or any part thereof, be forthwith secured and taken into the custody of the Sheriff, as a pledge or surety to answer the just demand of the plaintiff, until the trial of such action and judgment and satisfaction thereon."

The meaning of these words seems to be perfectly clear and under the section the Sheriff would appear to hold the property seized as security for the plaintiff's claim if he succeeds in his action. *Prima facie*, therefore, the plaintiff is 'a secured creditor' who is defined in Section 2 of the Bankruptcy Ordinance as 'a person holding a mortgage charge or lien in the property of the debtor or any part thereof as a security for a debt due to him from the debtor' If he is a secured 'creditor' Section 8(2) of Ordinance No. 44 (Bankruptcy) operates and the property only passes to the Official Assignee subject to the creditor's charge.

A useful analogy is provided by the cases where the plaintiff has successfully contended that he is a secured creditor in respect of moneys paid into Court in the course of an action, see *Ex parte Banner*, L.R. 9 Ch. App. page 379 and *In re Ford*, (1900), 2 Q.B. page 211. In neither case was there anything in the Rules of Court under which the payment in was made, or in the form of the order itself which purported in express words to give the plaintiff a charge or lien over the money paid in. In the first case it was paid in 'to abide the event' and in the second as a condition of the defendant being given leave to defend. This was also treated as an order "to abide the event," and in the judgment of Wright, J. at page 213 he states "It is settled that where money is ordered to be paid into Court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the Court in his favour." If, therefore, a plaintiff in the case of a payment into Court in his action is to be regarded as a secured creditor even in the absence of express words to that effect in the Rules or in the Order itself, the argument in favour of the plaintiff being a secured creditor must be far stronger when the words of the Section itself so provide.

The learned trial judge has sought to distinguish the cases where payment into Court has been made on the ground that such payments in are voluntary, which is not the case where the defendant's property has been attached before judgment on an *ex parte* application. I doubt, however, whether at all events a payment into Court, only made as a condition of being given leave to defend, can be regarded as a voluntary payment, but in any case the Bankruptcy laws regard with more favour a payment under pressure than a voluntary payment to a creditor, the latter class of payments always being open

to attack as fraudulent preferences. If, therefore, there is any distinction on this ground between a payment into Court and an attachment before judgment, such distinction would again operate to strengthen the argument in favour of a plaintiff who has obtained an order under Section 689 being a secured creditor.

It is also to be observed that property attached under Section 689 may be released under Section 690 upon the defendant giving such security as may seems just. If such security were provided by a payment into Court, the plaintiff would immediately become a secured creditor by virtue of the English decisions apart from the wording of Section 689 and it is difficult to see why a different result should follow merely because the defendant has made no application under Section 690.

I would, therefore, allow the appeal and direct payment out of Court to the plaintiff of his claim and taxed costs so far as the money in Court may extend. The plaintiff is also entitled to his costs both here and below against the second defendant.

Appeal allowed.

Solicitors for the Appellant—

Donaldson & Burkinshaw.

[ORIGINAL CIVIL JURISDICTION]

WEBSTER AUTOMATIC PACKETING FACTORY LTD.....Plaintiffs

vs.

CHOP KIM LEONG THYE.....Defendants

[SINGAPORE SUIT No. 369 OF 1932]

Trade Marks—passing-off—False representation—whether relief by injunction granted.

Where a trade mark itself contains a false representation calculated to deceive the public or if the trade itself is fraudulent, no action can be maintained to restrain the imitation of such a mark. When, however, the misrepresentation is merely collateral and the defendant is himself guilty of misrepresentation the plaintiff is not deprived of his remedy.

In a case, where the plaintiffs had stated on their labels that their tea was "specially packed in Ceylon by the growers"—a statement which was partially untrue, because they were not the growers and when the defendants had made on their labels a similar statement every word of which was false as the defendants' tea was grown in China:—

Held, that such false misrepresentation on the part of the plaintiffs being collateral and the defendants having been guilty of a glaring misrepresentation, the plaintiffs were entitled to an injunction.

The facts and arguments are related in the Judgment below.

H. R. S. Zehnder, for the plaintiffs.

Campbell, for the defendants.

Cur. Ad. Vult.

7-12-1932

TERRELL, J.—The plaintiffs are a company incorporated in Ceylon and the manufacturers of a tea known as Spring Leaf Tea. This tea is manufactured both in leaf and dust form. The tea with which this case is concerned is tea dust.

This tea is contained in packets of three sizes containing respectively 6 lbs., 3 lbs. and 1 lb. The plaintiffs' tea sold in this form has had a reputation on the local market since at all events the year 1918.

The defendants have since January, 1931, sold a brand of tea dust called Golden Dragon tea. This tea is also sold in packets of 6 lbs., 3 lbs., and 1 lb. As soon as the defendants' tea was put on the market the plaintiffs' local agents, F. A. Bartholomeusz Limited, wrote on the 5th January, 1931, protesting that the general get-up of the defendants' packages closely resembled the plaintiffs' packages, and asking for the usual undertaking. It is clear therefore that the plaintiffs asserted their rights at the earliest opportunity.

As to the merits little need be said. I have rarely seen a more deliberate and barefaced attempt to pass off goods as those of a rival trader. The get-up of the 6 lb. and 3 lb. packets is identical—there is the same red paper cover, and the labels are in the same place and are of the same size. The so called dragon on the defendants' label is so devised that at a small distance it looks like a leaf. The plaintiffs' device contains representations of medals which the tea is said to have won at the Paris Exhibition of 1900 and the Chicago Exhibition of 1893. The evidence did not go far enough back to establish these facts but there is no reason to suppose that they are untrue. The defendants do not commit themselves to alleging that they won any particular medals, but in places corresponding to the medals on the plaintiffs' device are representations of what might be taken for medals presented at exhibitions. The only possible object of these medals must be to enhance the similarity of the designs.

Perhaps the most significant similarity is the statement that appears on both plaintiffs' and defendants' packages in the following terms:—

> "Specially packed in Ceylon by the growers."

This statement is the foundation of the defendants' defence as it is admitted that plaintiffs are not the growers. I will deal with this aspect of the case later. On the issue of 'passing off' it is to be observed that it is admitted that the defendants' tea is wholly manufactured in China, and there can be no possible excuse for adopting from the plaintiffs' packets a statement which is only partially true in the case of the plaintiffs but a direct and